Supreme Court, U.S.
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NO. 98 - _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ROBERT L. PEELER, SR.,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR
A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION

SUBMITTED BY

ROBERT L. PEELER, SR.
PETITIONER, PRO SE
REG. NO. 89515-071
ALSTON WILKES HOME
614 PENDLETON STREET
GREENVILLE, S.C. 29601

QUESTION PRESENTED

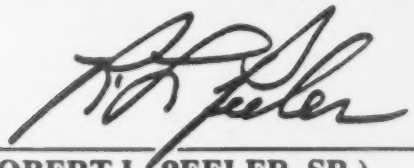
I.

DID THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT, COMMIT REVERSIBLE ERROR IN DENYING PETITIONER'S SECTION § 2255 MOTION FOR CERTIFICATE OF APPEALABILITY?

LIST OF PARTIES OF INTEREST

HALL, KENNETH K.
HAMILTON, CLYDE H.
HERLONG, HENRY M. JR.
JOSEY, J. RENE'
LUCIUS, WILLIAM C.
NIEMEYER, PAUL V.
SKEEN, SANDRA M.

This is to certify that the above is a list of attorneys, the trial judge, Court of Appeals judges and co-defendant all of whom are interested parties to the proceeding. Done to the best of Petitioner's knowledge and abilities this the 11th day of October, in the Year of our Lord and Saviour Jesus Christ, Nineteen Hundred Ninety-Eight.



(ROBERT L. PEELER, SR.)

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PETITIONER, PRO SE
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APPENDIX B - Order of the United States District Court For the District of So.Carolina, Anderson Division

OPINION

The opinion and judgment of the Fourth Circuit Court of Appeals entered on July 27, 1998 is reprinted in the Appendix at 1a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Fourth Circuit, affirming a judgment denying Petitioner's application for a writ of habeas corpus of the United States District for South Carolina, Anderson, was entered on July 27, 1998, Appendix 1a. This petition for certiorari is being filed within 90 days of the July 27, 1998 opinion and judgment. The Fourth Circuit Court of Appeals had jurisdiction pursuant to **Title 28 U.S.C. § 1291.** The jurisdiction of this Court is invoked pursuant to **Title 28 U.S.C. § 1254 (1).**

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy

> the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.

Statutory Provisions

Title 18 U.S.C. § 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purposes of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a company the corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural Credit association, bank for cooperatives, or any division, or officer, or employee thereof, or of any regional agricultural credit corporation, established pursuant to law or of the National Agricultural Credit Corporation, a Federal Land Bank, a Federal Land Bank Association, a Federal Reserve Bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance

Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and 3) of section 1 (b) of the International Banking Act of 1978, or an organization operating under Section 25 or Section 25 (a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise or the acceptance, release or substitution of security therefore shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S.C. § 152 provides:

A person who -

(1) Knowingly and fraudulently conceals from a custodian, trustee, marshal or other officer of the Court charged with the control or custody of property, or in connection with a case under Title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) Knowingly and fraudulently makes a false oath or account in or in relation to any case under Title 11;

(3) Knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under **Section § 1746 of Title 28**, in or in relation to any case under Title 11;

(4) Knowingly and fraudulently presents any false

claim for proof against the estate of a debtor, or uses any such claim in any case under Title 11 in a personal capacity or as or through an agent proxy, or attorney;

(5) Knowingly and fraudulently receives any **material** amount of property from a debtor after the filing of a case under Title 11, with intent to defeat the provisions of Title 11;

(6) Knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under Title 11;

(7) In a personal capacity or as an agent or officer of any person or corporation in contemplation of a case under Title 11, by or against the person or any other person or corporation, or with intent to defeat the provisions of Title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) After the filing of a case under Title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies or makes a false entry in any recorded information (including books, documents, records and papers) relating to the property or financial affairs of a debtor; or

(9) After the filing of a case under Title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the Court, or a United States Trustee entitled to its possession, any recorded information (including books, documents, records and papers) relating to

the property or financial affairs of a debtor,

Shall be fined not more than $5,000, imprisoned not more than 5 years, or both.

(Underlined added by Petitioner for emphasis).

STATEMENT OF THE CASE AND THE FACTS

A. The Procedural History, Charges, Conviction and Sentence

Petitioner was the sole stockholder of Carolina Leasing, Inc. For fifteen years and was in the vehicle leasing and renting, vehicle wholesale and retail sales, factoring of accounts receivable and other related businesses which were based in Anderson, South Carolina. The nature of Petitioner's businesses required substantial lines of credit approximating **TWENTY MILLION DOLLARS ($20,000.000)** with various banks and financial institutions. South Carolina National Bank's ("WACHOVIA") was Petitioner's lead bank for fifteen years, twelve of which Petitioner served as a **Director** on South Carolina National Bank's("WACHOVIA") **local Advisory Board** and was nominated by the bank for South Carolina's **"SMALL BUSINESSMAN OF THE YEAR"**, placing among the **top five (5) finalists statewide.**

Petitioner was actively involved in the Anderson community for a number of years, serving as chairman, president or volunteer of many local civic clubs and fund-raising organizations. Petitioner was elected to serve two terms on the **BOARD OF VISITORS of ANDERSON COLLEGE** and chaired several major fund-raising campaigns including the College's Fine Arts Center. Petitioner was also an active member of the **FIRST BAPTIST CHURCH** of Anderson and was elected a **DEACON** twice and served on the **BOARD OF DEACONS** a total of five (5) years, was appointed to two (2) three-year terms to the **FINANCE COMMITTEE** and was elected **CHAIRMAN** both terms and was **ADULT ONE SUNDAY SCHOOL SUPERINTENDENT** five years.

Petitioner was a corporate/commercial borrower of South Carolina National Bank ("WACHOVIA") for fifteen successful years reaching combined lines of credit exceeding **ELEVEN MILLION ($11,000,000), SIX AND A HALF MILLION DOLLARS ($6,500,000)** with **NATIONSBANK** and **ONE MILLION DOLLARS ($1,000,000)** with **FIRST UNION BANK** and **TWO AND A HALF MILLION DOLLARS ($2,500,000)** with other financial institutions all of which were renewed and/or increased for fifteen consecutive years until January, 1990 at which time South Carolina National Bank ("WACHOVIA") had begun preliminary merger talks with "WACHOVIA" and **DID NOT** renew Southeastern Wholesalers, Inc.'s **ONE MILLION DOLLAR ($1,000,000)** floor plan line of credit although all other lines were renewed and increased, specifically Carolina Leasing, Inc's line was renewed and increased from **EIGHT MILLION DOLLARS ($8,000,000)** to **EIGHT AND A HALF MILLION DOLLARS ($8,500,000).**

South Carolina National Bank's **"CALL"** of Southeastern Wholesalers, Inc.'s **ONE MILLION DOLLARS ($1,000,000)** was primarily due to the bank's non-conformity of Banking Regulations, the OFFICE OF THE COMPTROLLER OF CURRENCY'S generally accepted banking principles and procedures and most importantly to SCN's Executive Committee and Senior Officers - not being consistent with "WACHOVIA'S" commercial loan policies in that SCN had **NEVER** made a physical verification or wholesale commodity check of its collateral throughout the entire four year life of this particular line of credit when standard banking procedures require such at least every thirty to sixty days.

Simply stated, South Carolina National Bank's procedures did NOT conform to the gilt-edged, blue ribbon requirements of "WACHOVIA'S" loan portfolio. Therefore, SCN **"CALLED"** Petitioner's line of credit resulting in unattainable demands being placed by SCN on Petitioner and Petitioner's companies.

Subsequently, Petitioner, in desperation, placed three of Petitioner's companies (Carolina Leasing, Inc., Carolina Diversified Financial Corporation and Southeastern Wholesalers, Inc.) Under the so-called protection of Chapter 11 Bankruptcy Code on August 7, 1991.

South Carolina National's Senior Officers, James G. Lindley, Chairman and Chief Executive Officer, Joe A. Padgett, Executive Vice President, C.C. Hutto, Jr., Senior Vice President and David L. Beard, Senior Vice President, through the bank's attorney. Andrew J. White, Jr., manipulated the system in getting **"THEIR MAN"** appointed Trustee so as **EVERYTHING** would appear in a light most favorable to the bank and the aforementioned officers.

Mr. White, as attorney for SCN, demanded of the Court (Courthouse records, dockets, files, etc., are laced throughout with innumerable notes of Mr. White's demands) that James L Ruane, III be appointed Trustee.

The Court did just that - appointed James L. Ruane, III, Trustee, although Ruane had never previously been a Trustee - had no experience as a TRUSTEE - and didn't even have security clearance to be a TRUSTEE and furthermore didn't even reside in the same state in or near Anderson, South Carolina which is where Petitioner's businesses were based, but resided out-of-state - 125 miles away, in Charlotte, North Carolina.

And all the while at least six (6) experienced, seasoned, well qualified and pre-approved veteran TRUSTEES already with Security clearance were on stand-by, "waiting in the wings" for a beckon call.

Nonetheless, the Court, at SCN's insistence, appointed an inexperienced, non-resident, out-of-state **"ROOKIE"** - a **NOVICE**, who had never been a TRUSTEE, to be the TRUSTEE of a FIFTEEN MILLION DOLLAR estate.

James L. Rune, III, was appointed - TRUSTEE - on October 16, 1991. Because of the TRUSTEE's complete lack of experience and inability, the TRUSTEE misinterpreted as "irregularities" certain selected transactions which in fact had been an accepted long standing bank practice and "course of conduct" by South Carolina National Bank spanning over a period of 15 consecutive years. South Carolina National Bank's loan covenants and restrictions stipulated the bank's pre-investigation and prior approval of all credit submitted by Petitioner and "Petitioner" related companies. Upon bank approval by Senior Officers of the bank, the bank

then processed all loan transactions and in the same motion, in turn made direct-deposits into "Petitioner's" Companies bank checking accounts. This system and procedure was used effectively and successfully by the bank for over 15 years in **processing over $100 MILLION DOLLARS in loan transactions.**

The Trustee was simply not capable of grasping the magnitude of "Petitioner's" businesses or "Petitioner's" 15 year relationship with the bank which included four (4) different City Executives, all of whom were promoted to positions of greater responsibility.

The end result of the TRUSTEE's inexperience and inability to understand the nature of "Petitioner's" business resulted in "Petitioner" and "Petitioner's" Office Manager and Vice President, Sandra M. Skeen, of 15 years being indicted on April 27, 1993.

"Petitioner" and "Petitioner's" co-defendant were charged in a 12 count indictment in the District of South Carolina. Counts one through nine charged "Petitioner" and Ms. Skeen with making material false statements on loan applications with banks insured by the FDIC in violation of **Title 18 U.S.C.§ 1014**. Count ten charged "Petitioner" and Ms. Skeen with knowingly and fraudulently withholding documents relating to a debtor's assets from the bankruptcy TRUSTEE and Counts eleven and twelve charged "Petitioner" with withholding, concealing and falsifying various bankruptcy records in violation of **18 U.S.C.§ 152.**

On March 11, 1994, the Jury found "Petitioner" guilty on all 11 counts including an arguable finding by the Court of perjury and obstruction of justice.

The Court imposed a Sentence of sixty-three (63) months on "Petitioner" in striking contrast to the United States Attorney's Office's proffer of eighteen (18) to twenty-one (21) months.

Co-defendant, Ms. Skeen, was found guilty on all counts and the Court imposed a sentence of forty (40) months in even more striking contrast to the United States Attorney's Office's proffer of a plea to **Title 18 U.S.C. § 4, "MISPRISION OF FELONY"** and four months to which

Ms. Skeen responded that if she "**could not lie for "Petitioner" she certainly couldn't lie against "Petitioner".**

There was **NO FINE** and **NO RESTITUTION** imposed by the Court on "Petitioner" or "Petitioner's" Co-defendant.

During trial "Petitioner's" Counsel made a **MOTION FOR A MISTRIAL** and subsequently **MADE A MOTION FOR A NEW TRIAL** and **FILED A MOTION FOR APPEAL** but totally contrary to "Petitioner's" Counsel's prior conduct, attorneys for both "Petitioner" and Ms. Skeen filed an Anders Brief on April 19, 1995 advising the Fourth Circuit that no meritorious issues existed for appeal.

On June 3, 1996 the Fourth Circuit affirmed.

On September 3, 1996 "Petitioner" and Ms. Skeen filed for Petition for Writ of Certiorari with the United States Supreme Court.

On February 19, 1997 the Supreme Court denied the Petition.

Civil actions ensued and are presently pending in Federal Court, South Carolina District, against "WACHOVIA", et al for **TAMPERING WITH WITNESSES** and a separate civil action against "WACHOVIA" and its attorneys has been filed for **DEFRAUDING THE COURT BY FILING FALSE DOCUMENTS WITH THE COURT PERTAINING TO TAMPERING WITH WITNESSES;** a civil action has been filed against the TRUSTEE and the TRUSTEE's attorney for **PERJURY AND DEFRAUDING THE COURT BY FILING FALSIFIED BILLINGS TO THE ESTATE** and additionally another civil action has been filed against the less than honorable (detailed in instant petition) presiding judge - Henry M. Herlong, Jr., for **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"**.

(Underline and **BOLD** added
By "Petitioner" for emphasis).

REASONS FOR GRANTING THE WRIT

DID THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT, COMMIT REVERSIBLE ERROR IN DENYING "PETITIONER'S" SECTION § 2255 MOTION FOR CERTIFICATE OF APPEALABILITY?

The matter before the Court is a Petition for a Writ of Certiorari for "Petitioner's" **Section § 2255** Motion for Certificate of Appealability.

Clemson University was ". . . at the very heart of four (4) counts of . . . 'Petitioner's' criminal trial, Cr. No. 8:93-165, ALL-USA vs. Peeler, et al" over which United States District Judge Henry Michael Herlong, Jr., of the South Carolina District, Anderson Division, presided in direct known conflict of interest.

Judge Herlong is a graduate of Clemson University, Class of '67, Judge Herlong's daughter, Faris Elizabeth Herlong, was attending Clemson University during trial and subsequently graduated; Judge Herlong's son, Henry Michael Herlong, II, was also attending Clemson University during trial and he, too, subsequently graduated and Judge Herlong even served as an Area Representative for the fund-raising arm of Clemson University's Athletic Department (IPTAY) - **N O N E** - of which was responsibly disclosed by Judge Herlong pre-trial or during trial and were in fact concealed by Judge Herlong until forced disclosure by "Petitioner" following "Petitioner's" discovery twelve (12) months subsequent to "Petitioner's" incarceration.

Right here, in this Court, **THE SUPREME COURT**, the highest Court in the land, even **JUSTICE CLARENCE THOMAS** recused himself in a much lesser family/Alma Mater related case, according to the June 2, 1997 issue of **USA TODAY**, which stated,

> **"Justice Clarence Thomas has also faced family related recusal problems. He bowed out of a case last year that challenged the ALL-MALE PROGRAM at the Virginia Military Institute, presumably because his son, Jamal, was a student there."**

However, Judge Herlong, in a much, much greater circumstance, knowingly and willfully did not recuse himself but through irresponsible apostasy and **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** compromised the **"judicial ethics"** of the very Court over which he prejudiciously presided and did so in favor and protection of his and his daughter's and his son's - **THE HERLONG FAMILY's** - Alma Mater, Clemson University.

And again in **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"**, Judge Herlong, as presiding Judge, knowingly failed to recuse himself sua sponte and irresponsibly did so in deliberate, direct defiance of **Title 28 U.S.C. § 455 (a.),**

> **"Any justice, judge or magistrate in the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."**

Judge Herlong's course of conduct and continued practice and pattern of compounding failures of **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** progressed during trial and graduated to an egregiously astonishing level - climaxing into an incredible crescendo.

Judge Herlong in his **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** as inescapably and indisputably evidenced in the trial transcript, **allowed a confession to a misrepresentation of a material fact** by the Associate Athletic Director of **CLEMSON UNIVERSITY (Judge Herlong and Judge Herlong's daughter and son's ALMA MATER)** for the sole purpose of **fraudulently obtaining** automobile insurance - openly admitting to **INSURANCE FRAUD** - in the presence of Judge Herlong - in Judge Herlong's Court - during trial in proceeding 93-CR-165 All-USA v. Peeler, et al, and Judge Herlong **did nothing - absolutely NOTHING!** The same Athletic Department that Judge Herlong solicited money for as Area Representative, the same Athletic Department he played football for and the same Athletic Department to which he personally contributes and makes

donations for a private and personal cause and the same Athletic Department in which he has a ... very personal interest!

Judge Herlong in his **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** allowed his and his daughter and son's **Alma Mater's (CLEMSON UNIVERSITY)** Athletic Director to testify,

> **"In the case of the car that I drove from a dealership here in Greenville, South Carolina I was listed as a "NON-COMPENSATED EMPLOYEE"!**

Indisputably, an admission to a blatant misrepresentation of a material fact - an admission to a crime and Judge Herlong, again, in **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** sat passively - just sat - and unbelievably did nothing.

Petitioner's Counsel questioned Clemson's Associate Athletic Director as to,

> **"NON-COMPENSATED EMPLOYEE OF WHO?"**

And Clemson's Associate Athletic Director replied,

> **"OF THE DEALERSHIP!"**

Judge Herlong continuing his **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"**, did nothing!

Petitioner's Counsel further questioned Clemson's Associate Athletic Director,

> **"THAT WASN'T CORRECT, WAS IT?"**

And Clemson's Associate Athletic Director replied,

"MAY NOT HAVE BEEN, BUT THAT WAS THE WAY IT WAS HANDLED!"

Clearly, as indisputably and inescapably evidenced in the trial transcript, this was another admission to a crime and to a misrepresentation of a material fact - a confirmation of Herlong's course of conduct involving a conflict of interest and Judge Herlong in his **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** maintained his continuity of purpose - of **protecting his and his children's Alma Mater, CLEMSON UNIVERSITY,** and in so doing, compromised the **"JUDICIAL ETHICS"** of the very Court over which he presided and again, in **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY",** stunningly did nothing.

Petitioner's Counsel in further questioning asked Clemson's Associate Athletic Director,

"IT'S POSSIBLE THEN THAT YOU HAVE ALLOWED A DEALER TO CARRY YOU AS A 'NON-COMPENSATED EMPLOYEE' FOR INSURANCE PURPOSES?"

"THAT'S CORRECT!"

Was the reply of Clemson's Associate Athletic Director.

Clearly, the exclamation - **"THAT'S CORRECT!"** - substantiated and confirmed even further the previous misrepresentations of material facts and again, Judge Herlong, in **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"**, shockingly, did nothing.

Petitioner's Counsel then asked Clemson's Associate Athletic Director,

"WHAT WOULD THE INSURANCE - WHY IS IT THAT CLEMSON WANTS THE DEALER TO CARRY THE INSURANCE?"

And Clemson's Associate Athletic Director replied,

> **"BECAUSE IF THEY PAY THAT EXPENSE THEN THE ATHLETIC DEPARTMENT WOULD NOT INCUR IT. ONCE AN EMPLOYEE WAS ON THE DEALER PROGRAM (AS A 'NON-COMPENSATED EMPLOYEE' OF THE AUTOMOBILE DEALERSHIP), THEY THEN RECEIVED A CAR AND INSURANCE. SO ITS TO THE BENEFIT OF OUR - IT WOULD REDUCE OUR EXPENSES IF THE DEALERSHIP WOULD PROVIDE THE INSURANCE SO THEREFORE, WE TRIED TO CULTIVATE THOSE RELATIONSHIPS."**

Indisputably, this was an admission that the Clemson University Athletic Department conspired in an artifice involving - **INSURANCE FRAUD** - through the misrepresentation of material facts and knowingly did so for the sole purpose of fraudulently obtaining automobile insurance without incurring the expenses of the costs of the premiums, and yet, again, with personal interest in the Athletic Department, Judge Herlong, Clemson graduate, Class of '67, unbelievably, did - **NOTHING.**

Moreover, not just once or twice, but thrice while preserving his own interest, did Judge Herlong unhesitatingly in **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** allow Clemson's Associate Athletic Director to openly and "freely" make confessions to misrepresentations of material facts and permitted infirmities in seriatim to "flow through" to the definite detriment of Petitioner and in so doing denied Petitioner the right to a fair trial.

Judge Herlong unquestionably knew before the proceedings began against Petitioner, that Petitioner had a Constitutional and Statutory right to a fair trial and a trial by an impartial judge.

The right to a fair trial and a trial by an impartial judge extended so far as to require that Judge Herlong himself recuse himself when even the

slightest scintilla - the slightest hint of circumstances existed that would so much as imply that Judge Herlong's impartiality might reasonably be questioned under **Section § 455 (a).**

Congress rewrote **Section §455 (a)** in 1974 for the specific purpose of "broaden(ing) and clarify(ing) the grounds for disqualification." **Lilejeberg v. Health Services Acquisition Corp., 486 U.S. 847, S. Ct. 2194, 100 L. Ed. 2d. 855 (1988).** Under the new version of **Section §455,** a judge is under an affirmative, self-enforcing obligation to recuse himself sua sponte whenever the proper grounds exist. **Section § 455** does away with the old "duty to sit" doctrine and requires Judges to resolve any doubts they may have in favor of disqualification.

Judge Herlong knew that Clemson University was ". . . at the very heart of four (4) counts of . . . 'Petitioner's' criminal proceeding" prior to his assignment and acceptance thereof and of the natural conflicts and consequences since he and his daughter and son were Clemson graduates.

"Prejudgment as to the facts giving rise to liability or reason to believe such exist, if fairly supported would establish bias or prejudice requiring a judge to disqualify himself," **Bradley v. School Board of City of Richmond, VA., 324 F. Supp. 439 (D.C., Va., 1971).**

"A Trial Judge must assiduously perform his function as governor of the trial dispassionately, fairly and impartially. He must not predetermine a case and we must condemn any conduct before or during the course of trial which indicates predisposition. It is important that a litigant not only actually receive justice, but that he believe he has received justice," **Crandell v. United States, 703 F. 2d. 74 (4th Cir., 1983).**

"A judge is required to recuse himself under **28 U.S.C. Sections §§ 144, 455 (a)** if an objectively responsible person informed of the facts would conclude that the Judge's impartiality might reasonably be questioned were the Judge to continue to hear the case," **Denardo v. Municipality of Anchorage, 974 F. 2d 1200, 1201, (9th Circuit, 1992).**

"The very purpose of **Section § 455** is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever

possible," **Liljberg, 108 S. Ct. At 2205.**

In a recent case out of the Fourth Circuit, the Court emphatically stated that "a judge must not give the appearance of bias or partiality in any way," **(United States v. Wilson, 135 F 3d. 291, 307, 4th Cir., 1998).**

Judge Herlong gave every appearance of bias and partiality throughout Petitioner's proceeding particularly during Clemson's Associate Athletic Director's testimony.

Judge Herlong as a United States District Judge knew or should have known that the Clemson University's Associate Athletic Director's confessions and admissions to misrepresentations of material facts were clearly and unequivocally violations of the Insurance Laws of the State of South Carolina, committed by the Associate Athletic Director of the **HERLONG FAMILY's** Alma Mater, Clemson University, which was directly related to Herlong's personal interest.

Subsequently, Petitioner made inquiries to the South Carolina Department of Insurance and that Department's Staff Attorney, S. Phillip Lenski, responded,

> **"In response to your questions, the Insurance Laws of the State of South Carolina do not permit any person to make a misrepresentation for the purpose of obtaining any type of insurance, more specifically, no one is permitted to misrepresent any material fact to an insurer when applying for an automobile insurance policy. The South Carolina Department of Insurance cannot and would not approve of individuals misrepresenting material facts to insurers for the purposes of obtaining automobile insurance and or reduced automobile insurance rates."**

AND JUDGE HERLONG, AS A UNITED STATES DISTRICT JUDGE, KNEW THAT.

Judge Herlong's actions or inactions were "**WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY**" and were those of a Clemson University Alumnus, unequivocally, not those of a responsible and Honorable United States District Judge.

"Indeed, Judge Herlong's blood runneth Clemson Orange - not red, white and blue of - ye olde U.S. of A.!!"

Notwithstanding, Judge Herlong totally disregarded Petitioner's rights to a fair trial and unquestionably permitted circumstances outside Judge Herlong's judicial scope to result in acts which deprived Petitioner of his right to a fair trial by an impartial judge.

"The Sixth Amendment of the Constitution guaranteed Petitioner the right to be tried before a judge who was impartial and indifferent," **Irvin v Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); Morgan v. Illinois, 504, U.S. _____, _____, 112 S. Ct. 2222, 2229, 119 L. Ed. 2d. 492, (1992).**

Judge Herlong was neither - impartial nor indifferent. A look at the record and an examination of the facts clearly support that Judge Herlong was not impartial nor indifferent.

Further Judge Herlong referred to his opinion as to why he did not have to recuse himself for purposes of the **§ 2255** proceedings. This is important because, although substantially similar, the two issues are not the same and Petitioner wishes to point out to the Court the distinction between the two.

Petitioner is bringing this matter to the Court's attention because when Judge Herlong addressed the issue of his impartially during the trial, he denied relief.

As further evidence during trial, Judge Herlong's repeated reactions, gestures, gyrations and facial expressions of absolute and utter disgust to Petitioner's testimony in the presence of the Jury reached such magnitude and scope as to prompt Petitioner's Counsel to make a **MOTION FOR MISTRIAL,** which Judge Herlong denied and

Petitioner's counsel subsequently revived in a post trial **MOTION FOR NEW TRIAL**, which stated in pertinent part,

> **"C O M E S N O W the Defendant, Robert L. Peeler, Sr., who moves this Court for an Order granting a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure, upon those grounds raised by his Counsel in a Motion for Mistrial. That being that the Court, by reasons of facial expressions and questions and comments made while the Defendant testified, unfairly prejudiced the Defendant's credibility so as to prohibit fair and impartial deliberations by the Jury upon the factual issues involved in the Jury's determination of guilt."**
>
> **"During the course of Defendant's testimony, The Court unduly challenged and corrected Defendant's method of answering questions which impaired Defendant's ability to answer questions in the manner he would normally have answered questions which created an unnatural response. The Court's questions to Defendant were irrelevant and uncalled for (Judge Herlong sarcastically asked Petitioner if Petitioner had a 'Law Degree') and impacted Defendant's ability to proper place his credibility before the Jury, to the extent that he was denied a fair trial."**
>
> **"The basis for the Court's actions as articulated on the record, do not justify the repeated comments, facial expressions and tone of voice exhibited."**

The **MOTION FOR A NEW TRIAL** was likewise, denied.

Notwithstanding, Judge Herlong's air of indifference and total abstinence of impartiality continued post trial.

Petitioner pointed out to the District Court that Clemson University was ". . . at the very heart of four (4) COUNTS OF . . ." Petitioner's trial. And that Judge Herlong was a graduate of Clemson University, Class of '67, that Judge Herlong's daughter was a graduate of Clemson University and that Judge Herlong son was a graduate of Clemson University and that Judge Herlong failed . . . just failed . . . to make proper disclosures pre-trial or during trial.

Yet, Judge Herlong, unbelievably and obviously self-serving and evasively wrote in his Order denying Petitioner's application for a writ of Habeas Corpus,

> **"THE PLACE OF THE COURT'S ALMA MATER IS A MATTER OF PUBLIC RECORD."**

With all due respect to the Court and however contrary to Judge Herlong's signature manipulating maneuvers, the place for the Court's Alma Mater should be a matter of the Court's record, unequivocally and indisputably, where it belongs in view of the Court's Alma Mater and the Court's daughter and son's Alma Mater being directly involved in four (4) counts of the instant case.

Judge Herlong was fully aware of this obvious fact prior to trial and prior to Petitioner's **Section § 2255 Motion** and should have recused himself sua sponte.

"A judge is required to recuse himself under **28 U.S.C. A. §§ 144, 455** if an objectively reasonable person informed of the facts would conclude that the Judge's impartiality might reasonably be questioned were the Judge to continue to hear the case," **Denardo v. Municipality of Anchorage, 974 F. 2d. 1200, 1201, (9th Circuit, 1992).**

Judge Herlong should have made disclosures, he did not. Judge Herlong should have recused himself sua sponte, he did not., Judge Herlong

should have pointed out to the Jury that Clemson University's Associate Athletic Director, a key Government witness, testified to a misrepresentation of material facts and did so for the sole purpose of fraudulently obtaining automobile insurance, he did not. Judge Herlong should have questioned the blatant artifice of conspiring to commit Insurance Fraud by his Alma Mater, Clemson University, against the Insurance Laws of the State of South Carolina, he did not. And Judge Herlong should have transferred Petitioner's **§ 2255 Motion** to a different and Honorable Judge, but he did not.

Simply stated, Petitioner is stating that the Fourth Circuit committed reversible error by allowing Judge Herlong to preside over Petitioner's § 2255 proceeding and also committed reversible error by ruling that Petitioner was not deprived of the right to a fair trial because of bias and prejudice and **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** by Judge Herlong.

It is overwhelmingly axiomatic that Judge Herlong's bias, prejudice and partiality - his **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** amalgamated accumulatively to such great magnitude as to deliberately deprive Petitioner of his Constitutional Right to a fair trial.

In a recent case out of the Fourth Circuit, the Court clearly states, "A Judge must not give the appearance of bias or partiality in any way or become pervasive in his interruptions and interrogatories that he may appear to usurp the role of either the prosecutor or the Defendant's Counsel," **(United States v. Wilson, 135, F. 3d. 291, 307 (4th Cir., 1998).**

Judge Herlong's bias and prejudice and partiality not only was questioned but confirmed in his continuity of purpose in protecting his and his daughter's and his son's Alma Mater, Clemson University, as is evidenced in the trial transcript.

Petitioner has been a Clemson University Car Donor for 15 consecutive years and Clemson's Associate Athletic Director, S. Leonard Gough, was responsible for the Clemson Car Donor Program.

Mr. Gough admitted during trial in sworn testimony, under oath, that because of the long standing 15 year relationship that he and Clemson University had with Petitioner as a Clemson Car Donor, that Clemson's Gough called Petitioner in his and Clemson's hour of desperate and urgent need to arrange delivery of six (6) automobiles for the newly arriving Clemson Head Football Coach, Ken Hatfield, following Clemson's termination of the previous Head Coach, Danny Ford.

Mr. Gough admitted that he "sought out" Petitioner - Petitioner did NOT seek out Mr. Gough.

Mr. Gough admitted that he had advance reservations, prior commitments and was previously committed to be in New York celebrating his Wedding Anniversary with his wife when the new Clemson Coach was scheduled to arrive and further admitted that he could not be present to "personally tend" to the business at had - that of ensuring proper delivery of the six (6) vehicles to the newly arriving Clemson Coach.

Clemson's Gough testified and admitted that he represented Clemson University and that Bobby Robinson, Clemson's Athletic Director, would honor his negotiations.

Petitioner had been requested previously over the past 15 years to **"sign for"** Clemson personnel and again in this specific instance, Petitioner was requested to **"cover"** for Mr. Gough in his absence and sign for him, in his stead, whatever paperwork was necessary in order to guarantee delivery of the six (6) vehicles to the newly arriving Head Football Coach.

However, during the trial Clemson's Gough admitted that he had no signature authority to contractually obligate and bind Clemson University (unbeknownst to Petitioner at the time of request) and Mr. Gough further admitted under oath that he had signed leases and contracts in the past and had been **"chastised"** by his superiors for doing so. And yet after admitting to all of the foregoing, Clemson's Gough - **denied** - requesting Petitioner to sign his name for him, in his absence, to the necessary, required paperwork in order to ensure delivery of six (6) vehicles to the newly arriving Head Football Coach.

Clemson's Gough admitted that because of the longstanding fifteen (15) year relationship that he and Clemson University had with Petitioner as a Clemson Car Donor, that Mr. Gough called Petitioner, Petitioner did not call Clemson's Gough; Clemson's Gough admitted that he **"sought out"** Petitioner; Clemson's Gough called Petitioner in his and Clemson's hour of desperation and need, Petitioner, the same Clemson Car Donor that Clemson had grown to rely and depend upon for a number of requests, and various needs over the past fifteen (15) consecutive years; Clemson's Gough did not call the dealership where he admitted in sworn testimony to misleadingly listing himself as a **"NON-COMPENSATED EMPLOYEE"** of the automobile dealership (and did so for the sole purpose of fraudulently obtaining automobile insurance); Mr. Gough admitted **"that wasn't correct"** (his being listed as a "Non-Compensated Employee" of the dealership) but **"that's the way it was"**; Mr. Gough admitted to making misrepresentations of material facts under oath; Clemson's Gough admitted **"cultivating relationships"** with other dealers so as to fraudulently obtain automobile insurance for other Clemson University Athletic Staff members; Mr. Gough admitted requesting six (6) automobiles for Coach Ken Hatfield's entourage; Mr. Gough admitted that in the negotiations with Petitioner that he **"represented the University"** (Clemson); Clemson's Gough admitted that Mr. Bobby Robinson, Clemson Athletic Director, would **"honor his negotiation"** (with Petitioner); Mr. Gough admitted that he **"himself, would honor his longstanding relationship"** (with Petitioner) and Mr. Gough admitted that he was previously committed to be in New York celebrating his Wedding Anniversary with Mrs. Gough when Coach Hatfield arrived at Clemson and Mr. Gough admitted that he could not be present to **"personally tend to business"**; Mr. Gough admitted that he did not have the authority to sign any leases or contracts committing or obligating Clemson contractually and Mr. Gough further admitted that he **"had"** (signed leases and contracts as a representative of Clemson University) without prior authority or approval in the past and Mr. Gough admitted that he had been **"chastised"** by his superiors at Clemson University for doing so.

Nonetheless, with the overpowering and convincing, foregoing plethora of admissions, Clemson's Gough, amnesicly - **denied** - requesting Petitioner to sign his name for him in his absence so as to guarantee delivery of the six (6) cars to the new Coach.

And after the abundance of admissions by Clemson's Gough, Judge Herlong, **Clemson graduate, Class of '67, "sided"** with his Alma Mater's Associate Athletic Director and then had the audacity to charge Petitioner with Perjury and Obstruction of Justice, clearly and overwhelmingly axiomatic from Gough's testimony that Petitioner was truthful and had not obstructed justice. And Herlong did it all for - **THE HERLONG FAMILY'S - ALMA MATER.**

CLEMSON ALUMNUS (JUDGE) HERLONG, blatantly and biasly ruled,

> **"And concerning the testimony of Mr. Gough, as it compares to Mr. Peeler, the Court finds that Mr. Peeler intentionally, in his testimony at the trial in this Court, lied as to each and every lease involving Clemson University. And by so lying intentionally before this Court, he committed Perjury, and as a result of that Perjury, he obstructed justice and a two-point enhancement for Obstruction of Justice is proper.**
>
> **Any other objections?"**

Judge Herlong **"sided"** with Gough and ... CLEMSON "fired" him after "lying" and after 17 years of service!

Judge Herlong **"sided"** with his and his daughter's and his son's - THE HERLONG FAMILY'S -Alma Mater's Associate Athletic Director, a blantant transgression by the Court ... a transparent transmogrification.

Clemson University "fired" him . . . after "lying" and after 17 years of service!

Judge Herlong's consistency of continuity of purpose in favoring and protecting - THE HERLONG FAMILY'S - Alma Mater was overwhelmingly axiomatic andin so doing Herlong egregiously compromised the "JUDICIAL ETHICS" of the very Court over which he

so prejudiciously presided.

For Judge Herlong to have done otherwise, would have defied the very LAWS OF MAN and - THE LAWS OG GOD - for even CHRIST cautioned, "NO MAN - CAN SERVE TWO MASTERS!" (Matthew 6:24)

Judge Herlong's course of conduct was clearly, **"excepto probat regulam de rebus non exceptis,"** (an exception establishes the rule as to things . . . not excepted).

Judge Herlong "bruised" and abused the discretion of the Court. And the abuse of discretion standard has been described as allowing a range of choice for the District Court provided that choice does not "constitute clear error of judgement".

Judge Herlong's "clear errors of judgement" constituted and populated a small village.

A seriatim census, as exemplified, of Judge Herlong's village of violations clearly reveal Judge Herlong's signature manipulating maneuvers and mannerisms of **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY".** Judge Herlong willfully neglected his duty in failing to provide to make disclosures pre-trial or at trial, specifically, as to his being a Clemson University graduate, Class of '67, his daughter being a Clemson University graduate and his son being a Clemson University graduate compounded by the fact that Clemson University was "...at the very hear of four (4) counts of Petitioner's criminal proceeding"; Judge Herlong willfully neglected his duty, therefore, in failing to recuse himself sua sponte or ex mero motu, clearly a concealment of conflict by Judge Herlong; Judge Herlong willfully neglected his duty in passively allowing, unchecked and unquestioned the Clemson University Associate Athletic Director to confess to misrepresentations of material facts, insurance fraud and "masterminding" an artifice involving insurance fraud by Clemson's Athletic Department staff; Judge Herlong willfully neglected his duty in failing to uphold, enforce and protect the Insurance Laws of the State of South Carolina and deliberately did so for the sole benefit and advantage of **THE HERLONG FAMILY's** Alma Mater, Clemson University; Judge Herlong willfully neglected his duty by failing to make disclosures of **THE**

HERLONG FAMILY's Alma Mater in direct violation of **Title 28 U.S.C. Section § 455 (a.);** Judge Herlong willfully neglected his duty in violation of **Canon 3 of the "CODE OF JUDICIAL CONDUCT";** and Judge Herlong willfully neglected his duty in violation of **"OATHS OF JUSTICES AND JUDGES,"** under **Title 28 U.S.C.A. Section § 453,** which states, in pertinent part, **"I will faithfully and IMPARTIALLY discharge and perform all duties incumbent upon me . . ."** and did it - **ALL** - to the detriment of the Petitioner.

The plethora of egregious acts, some possible criminal in nature, was indisputably, unquestionably and unequivocally done knowingly and intentionally in **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY" . . . willfully.**

The Courts have held that, "In **'law'** the use of the words **'willful'** and **'willfully'** generally imply a conscious purpose to do wrong. Doing a thing knowingly and willfully implies not only knowledge of the thing done but a determination to do it with evil purposes or motive ***," **U.S. v. Ramey, 336 F. 2d. 512, 515 (1964).**

In Buckely v. Fitzimmons, 509 U.S. _____, 125, L. Ed. 2d 209, 113 S. Ct. 2606 (1993) the Supreme Court reiterated an established principal pertaining to the immunity government officials possess:

> **"Under this form of immunity, Government Officials are not subject to damages liability for the performance of their discretionary function when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."**

Id. 125 L. Ed. 2d. At 223 (internal quotations and citations omitted).

In **Harper v. Merckle, 638, F. 2d., 848, 857, 859 (5th Circuit, 1981),** the Court held that Judge Merkle's **personal interest** resulted in conduct outside his judicial duties, thus depriving him of judicial immunity.

> **"From the earliest days of our Republic to the**

present only on five occasions has the Supreme Court addressed squarely the issue of judicial immunity."

"Succinctly stated, we hold only that when it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives and it further appears certain that no party has invoked the judicial machinery for any purposes at all then the judge's actions do not amount to "judicial acts" thus, nonjudicial acts to state the obvious, are not cloaked with judicial immunity from suit under Section § 1983.)

"Fraud from the Bench is not a - JUDICIAL ACT!"

Judge Herlong's conduct here was a reckless replica of the foregoing - a non-stop nonfeasance of compromising the **"judicial ethics"** of the very Court over which he presided in favor of his and his daughter and son's Alma Mater, Clemson University.

"A Defendant is entitled to a neutral and detached Judge in the first instance," **Ward v. Monroeville, 34 L. Ed. 2d., 267 (1977).**

Judge Herlong's conduct was indisputably, a continuity of purpose of favoring and protecting Clemson University while simultaneously abandoning Petitioner's right to a neutral and detached Judge and a fair trial.

CONCLUSION

The aberrations of Judge Herlong's intentional " **WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** were many - failure to responsibly make pre-trial disclosures as required by law, failure to sua sponte recusal as required by law, failure in irresponsibly allowing a misrepresentation of material fact for the sole purpose of fraudulently obtaining automobile insurance by the Clemson University

Associate Athletic Director, failure in upholding the Insurance Laws of the State of South Carolina by allowing admissions to Insurance Fraud by Clemson's Associate Athletic Director and failure in allowing an admitted plan to expand an artifice involving Insurance Fraud by the Clemson University Athletic Department.

Right here in this Court, **THE SUPREME COURT**, the highest Court in the land, even **JUSTICE CLARENCE THOMAS** recused himself in a much lesser family/Alma Mater related case, according to the June 2, 1997, issue of **USA TODAY**, which stated,

> **"Justice Clarence Thomas has also faced family related recusal problems. He bowed out of a case last year that challenged the ALL-MALE PROGRAM at the Virginia Military Institute, presumably because his son, Jamal, was a student there."**

However, Judge Herlong, in a much, much greater circumstance, knowingly and irresponsibly did not recuse himself but through deliberate apostasy and in **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** compromised the **"judicial ethics"** of the very Court over which he prejudiciously presided and did so in favor and protection of his and his daughter's and his son's - **THE HERLONG FAMILY**'s - Alma Mater, Clemson University.

And in so doing, Judge Herlong vitiated His judgeship to the extent that he totally removed the veil of unimpeachable credibility of the Court, thus detaching both - honor and immunity.

Judge Herlong cannot on the one hand take on the chameleonic characteristics of - **CLEMSON UNIVERSITY** - through his **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** and on the other hand convert and run and hide behind the cloak of immunity.

When Judge Herlong elected to egregiously embrace impropriety in deliberate dereliction of duty, he disappointingly disrobed himself of all honor and detached the cloak of immunity.

Applying the Court's Barometer of Honor by which to measure, Judge Herlong's repeated pattern of **"WILLFUL NEGLECT AND DELIBERATE DERELICTION OF DUTY"** and continuity of purpose of protecting Clemson University, comparatively, was a series of transgressions equal to or greater than that with which Petitioner was charged.

Therefore, the Fourth Circuit's ruling of denying certificate of appealability and dismissing Petitioner's Appeal on the reasoning of the district court is clearly, reversible error.

Moreover, the Fourth Circuit committed reversible error in affirming that the presiding judge should decide Petitioner's **Section §2255 Motion** to transfer to an alternate judge.

"Indeed, a trial judge should not have the burden of deciding his own partiality or credibility," **Halliday v. United States, 380, F 2d, 270, 274 (1st Circuit, 1967).**

Post hoc, ergo propter hoc, (It's neither legally nor logically sound).

Therefore, the Fourth Circuit's Order denying Petitioner's Certificate of Appealability and dismissing appeal should be reversed in view of the foregoing facts accompanied by the following (1) The risk of injustice to the parties in the particular case (2) The risk that denial of relief will produce injustice in other case and (3) The risk of undermining the public's confidence in the judicial process, **U.S. v. Kelly, 888 F. 2d. 737, 745 (11th Circuit, 1989).**

All indicators clearly point to the fact that - Petitioner did not receive a fair trial.

"No right ranks higher than the right of the accused to a fair trial," **Press Enterprise v. Supreme Court of California, 464 U.S. 501 at 508.**

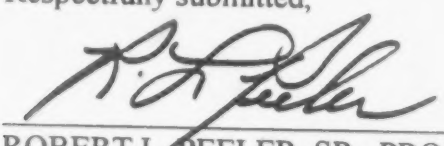
W H E R E F O R E, Petitioner prays this Honorable Court will reverse the Fourth Circuit's Order denying Certificate of Appealability and dismissal of Appeal and for the foregoing reasons,

it is requested that a writ of certiorari be granted.

I, Robert L. Peeler, Sr. declare under penalty of perjury under the laws of the United States of America that the foregoing is true pursuant to **Title 28 U.S.C. Section § 1746.**

Done this 15th day of October, 1998.

Respectfully submitted,



ROBERT L. PEELER, SR., PRO SE

APPENDIX A

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 98-6347

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

Versus

ROBERT L. PEELER, SR.,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Henry M. Herlong, Jr., District Judge. (CR-93-165, CA98-218-8)

Submitted July 2, 1998

Decided: July 2, 1998

Before NIEMEYER and HAMILTON, Circuit Judges and HALL, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Robert L. Peeler, Sr., Appellant Pro Se. William Corley Lucius, Assistant United States Attorney, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

APPENDIX A

PER CURIAM:

Robert L. Peeler, Sr., seeks to appeal the district court's order denying his motion filed under 28 U.S.C.A. § 2255 (West 1994 & Supp. 1998). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. United States v. Peeler, CR-93-165; CA-98-218-8 (D.S.C. Feb. 24, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Robert L. Peeler, Sr.	)	
	)	
Petitioner	)	Cr. No. 8:93-165
	)	C/A No. 8:98-219-20
Vs.	)	
	)	ORDER
United States of America	)	
	)	*Filed Feb 24, 1998*
Respondent	)	*Larry W. Propes, Clerk*
		U.S. District Court

This matter is before the court on two motions of Robert L. Peeler, Sr. ("Peeler"). Peeler first asks the court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Second, Peeler requests that another judge preside over his federal habeas petition. See 28 U.S.C. §§ 144 & 455. After a thorough review of the facts and pertinent law, the court denies both of Peeler's requests.

I. Procedural Background

On April 27, 1993, the United States charge Peeler and Sandra M. Skeen ("Skeen") with twelve violations of federal banking and bankruptcy law.[1] Following a trial before this court, a jury found both Peeler and Skeen guilty on all counts on March 7, 1994. In early December of 1994, this same court sentenced Peeler to sixty-three months in a federal penitentiary.

Peeler and Skeen appealed their convictions to the United States Court of Appeals for the Fourth Circuit on December 15-16, 1994. Peeler alleged several distinct grounds for appeal: (1) the prejudice of the district judge; (2)

---

[1] Nine of the charges involved the making of material, false statements on loan applications with federally insured banks. The remaining three accused Peeler and Skeen of fraudulently withholding documents and records from the bankruptcy trustee. One of the bankruptcy allegations was dismissed on March 1, 1994.

unfair bias of several government witnesses; (3) denial of effective assistance of counsel; (4) an ambiguous claim for "evidentiary facts and findings;" and (5) the improper calculation of money lost by him in his presentence report. See United States v. Skeen, Nos. 94-5938 & 94-5955, 1996 WL 288952 at **3 (4th Cir. June 3, 1996) (unpublished per curiam opinion). The Fourth Circuit dismissed all of Peeler's grounds for appeal and affirmed both convictions. Id. Peeler and Skeen filed a petition for a writ of certiorari to the United States Supreme Court on September 3, 1996. The Court refused this request. See Skeen v. United States, _____ U.S. _____, 117 S. Ct. 943 (1997).

Peeler filed the instant motions on January 26, 1998.

II. Factual Background

Peeler was a high volume car dealer in South Carolina. His business, Carolina Leasing, Inc. ("Carolina Leasing"), was very successful, particularly in the area of vehicle leasing. To conduct its business, Carolina Leasing would obtain significant lines of credit at area banks in order to purchase automobiles. In turn, the company would pledge the cars to the bank as collateral. This system enabled Carolina Leasing to provide large numbers of cars to a variety of clients, including Clemson University's athletic department.

Following demands for money by several banks, Carolina Leasing filed for bankruptcy in August of 1991. During the bankruptcy proceedings, the bankruptcy trustee discovered several problems with Carolina Leasing's financial records. An investigation by the Federal Bureau of Investigations revealed that Peeler and Skeen, through their business, had pledged the encumbered vehicles to several financial institutions as unencumbered collateral for their credit lines. Furthermore, the federal government charged that Peeler and Skeen had also submitted falsified and forged lease agreements to their banks, overstated the value of the vehicles pledged as security, and submitted false information to the bankruptcy trustee in an attempt to cover up their illegal activity. The investigation ultimately resulted in the twelve-count indictment against Peeler and Skeen.

III. Legal Discussion

Peeler's motions deal in large part with his allegation that the court's

personal bias tainted his criminal trial. The motion for federal habeas corpus relief is based on several grounds, one of which is the alleged bias at the criminal trial. Peeler also moves the court to reassign his petition to another judge. The court will first establish its right to consider the 2255 motion and then will analyze the merits of that motion.

A. Motion for Alternate Judge

Peeler is not entitled to have another judge consider this matter. The right to an unbiased adjudicator is grounded in the Due Process Clause of the United States Constitution. "(T)he due Process Clause clearly requires a "fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, ____ U.S. ____, ____, 117 S. Ct. 1793, 1797 (1997). Congress codified this rule in two separate sections of Title 28 of the United States Code: section 144 and section 455. Peeler invokes both of these sections in arguing for the court's recusal. (Pet.'s Mot. & Aff. For Alternate Judge at 2.) Therefore, the court will analyze Peeler's motion under each provision.

1. 28 U.S.C. § 144

Peeler is not entitled to relief under this section. Section 144 provides that:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record

stating that it is made in good faith.

28 U.S.C. § 144. Affidavits filed under this section must be "timely and sufficient." Sine v. Local No. 992, Int'l Bhd. Of Teamsters, 882 F.2d 913,914 (4th Cir. 1989). A judge ruling on a motion under section 144 may only determine the legal sufficiency of the affidavit, as the factual allegations of the affidavit are considered true for purposes of recusal. Lindsey v. City of Beaufort, 911 F. Supp. 962, 964-65 (D.S.C. 1995)(Perry, J.) Therefore, the court may only decide if Peeler's allegations are both timely and legally sufficient to require the court's recusal.

The instant motion requesting the court's recusal was not timely filed. Movant's under section 144 must "raise the disqualification of the . . . (judge) at the earliest moment after knowledge of facts." United States v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990). Peeler bases this motion on the fact that this court and members of his family graduated from Clemson University.[2] Peeler asserts that the court was biased towards him at trial because many of the changes before the court at Peeler's criminal trial stemmed from his leasing of cars to the Clemson University Athletic Department. (Aff. In Supp. Of Mot. For Alternate Judge at para. 3.) Peeler filed the instant motion in January of 1998. The place of the court's *alma mater* is a matter of public record, known to Peeler long before he filed the instant motion. This same charge was included in Peeler's appeal to the Fourth Circuit in 1995. See Skeen, 1996 WL 288952 at **3. It is likely that Peeler knew of the court's affiliation with Clemson University prior to and during his criminal trial. Therefore, Peeler failed to file for relief under section 144 upon learning of these acts. See Owens, 902 F.2d at 1156 (section 144 motion on a post-conviction matter untimely where defendant knew facts prior to conviction). Though the court finds that Peeler should have raised this issue during his criminal trial, it will further consider the merits of the motion and affidavit.

Peeler's affidavit, even when taken as true, does not warrant the court's recusal from this matter. It is the duty of a federal judge to "deny the relief claimed on account of the facts stated in the affidavit if they are legally

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[2] Specifically, Peeler notes that the court graduated from Clemson in 1967 and that the court has a daughter and son who also graduated from the institution. (Aff. In Supp. Of Mot. For Alternate Judge at para.3)

insufficient, as it is to grant relief if they are sufficient." Sine, 882 F.2d at 914 (citation omitted). "To be legally sufficient, the affidavit must (1) be filed by a party to the proceeding, and (2) state such facts and reasons sufficient to convince a reasonable person that a bias or prejudice exists." Lindsey, 911 F. Supp. At 965. Peeler was obviously a party to all proceedings involved in this matter. However, his reasons do not warrant, under the law, the court's recusal from this case.

Federal law does not require recusal for the facts alleged in Peeler's affidavit. "(T)he facts pleaded (in the affidavit) will not suffice to show the personal bias required by (section 144) *if they go to the background and associations of the judge rather than to his appraisal of a party personally.*" Lindsey, 911 F. Supp. At 971 (citation omitted)(emphasis added). Peeler's affidavit does not attest to any personal predilection by the court. The pleaded facts attempt to prove bias through relationships several times removed from the case at hand. Peeler's logic is as follows: (1) Peeler's criminal conduct involved, in part, Clemson University; (2) the judge and several of his relatives graduated from Clemson; (3) *ergo*, the judge's personal allegiance to Clemson University prevented Peeler from receiving a fair trial. This logical chain fails to directly connect the court to Peeler. This is because it cannot. At no time during the trial, or any other time, has the court expressed any personal animus towards Peeler. Put simply, no such animus exists. Peeler can only attempt to conjure up some prejudice by combing the court's personal and professional dossier for some limited connection to his case. Under the law, this is not sufficient to warrant a recusal under section 144.

2. 28 U.S.C. § 455

Peeler's attempt to remove the court from this case also fails under section 455. Section 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings ...

28 U.S.C. § 455. The standard under section 455 is considerable lower than under section 144. Unlike section 144's standards, under this section, Peeler's affidavit "carries no ... presumption of truth and the factual allegations may be examined, and if appropriate, rejected." Lindsey, 911 F. Supp. At 968-69. Therefore, the court must first consider the allegations in Peeler's affidavit.[3]

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[3] Peeler's affidavit reads:

COMES NOW, Robert L. Peeler, Sr., Petitioner, pro se, with the following affidavit in support of his motion for an alternate judge to preside over his § 2255 action and states as follows:

1. I am Robert L. Peeler, Sr., the Petitioner herein named; I am over the age of twenty-one (21) years; and I am legally competent to make this affirmation.

2. I am making this affidavit based on my knowledge of the facts involved in the above entitled action.

3. I filed with the Clerk of the U.S. Court of Appeals Fourth Circuit on December 10, 1995 a supplement to Defendant's Addendum (to Ander's Brief), which was entered on the Docket but for reasons unexplained, anot heard by the Appellate Court. That supplement alterted the Court of Judge Herlong's conflict of interest 28 U.S.C. § 455(a)) his bias, prejudice and total abstinence of impartiality in the above captioned proceeding.

Clemson University's Athletic Department was at the very heart of four (4) counts of this case. Judge Herlong was a Clemson graduate, Class '67. Judge Herlong's Daughter, Faris Elizabeth was a student at Clemson and Judge Herlong's son Henry Michael Herlong, III was a student at Clemson University.

Clemson's Associate Athletic Director testified to an admission to a commission of Insurance Fraud through misrepresentation of material facts to obtain insurance i.e. he (S. Leonard Gough) was a "non-compensated employee" of the Clemson Car Donor, which was a lie. Judge Herlong did nothing.

Clearly, Judge Herlong permitted an infirmity to pass through that adversely affected the Petitioner. Judge Herlong's abuse of discretion egregiously violated his oath of office through abuse of discretion by omission in violation of 18U.S.C. § 4.

Peeler's bald assertion of the bias of this court is without basis. As noted above, bias cannot be based on a judge's background. Id. At 971 (citations omitted). It is true that the court and his children graduated from Clemson University. However, the court's personal background has never affected its judgement. As Judge Matthew Perry stated when attacked in court for his professional background:

> No personal bias for or against any party is alleged, nor does such a bias exist. The affiant only assumes that such a bias exists and he points to my (professional background) prior to ascending to the bench . . . . . (This argument is not based upon any objective fact and it is inappropriate for inclusion in the affidavit.

Id. At 972 (emphasis added). Peeler's affidavit is also based on leaps in logic that he cannot support. Therefore, his motion under section 455 is denied.

B. Federal Habeas Corpus Motion

Just as Peeler's arguments fail to remove the court from considering this matter, so do his claims for relief under federal habeas corpus law. Peeler bases his motion on several grounds. The court will consider each ground individually.

1. Ineffective assistance of counsel

Peeler's final claim is that he received ineffective assistance of counsel. He claims specifically that his counsel: (1) failed to properly investigate and argue relevant case law in preparation for certain trial strategies; (2) failed to investigate and argue the judge's bias at trial; (3) failed to properly impeach a key government witness; (4) failed to raise pertinent issues on appeal. In order

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I, Robert L. Peeler, Sr., declare under penalty of perjury under the laws of the United States of America that the foregoing is true pursuant to Title 28 U.S.C. Code § 1746.

Executed on January 16, 1998
Signed s/ Robert L. Peeler, Sr.
Date 1-16-98

to successfully challenge a conviction on the basis of ineffective assistance of counsel, a prisoner must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984). The United States Court of Appeals for the Fourth Circuit defines effective assistance of counsel as that which is "within the range of competence demanded of attorneys in criminal cases." Marzullo v. Maryland, 561 F.2d 540, 543 (1977), cert. Denied, 435 U.S. 1011 (1978). Peeler fails to meet these standards.

a. Failure to prepare trial strategies

The failure of Peeler's counsel to succeed in a certain trial strategy did not render them ineffective. The Fourth Circuit has held: "Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel." Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). Courts presume that a trial counsel's tactics are "appropriate and necessary." Id. Peeler argues that his counsel was not effective because a trial strategy devised by his attorney was not allowed by the judge. Such a conclusory allegation, without more, fails to overcome this presumption that the strategy was proper.

b. Failure to argue trial judge's bias

Peeler's second argument for ineffective assistance of counsel holds no weight with this court. He claims his attorney should have brought up the court's alleged bias at trial. Peeler's attorney wasright not to argue the trial judge's bias. Thsi is because there was none. See, infra Part III.A.2. Accordingly, this argument cannot sustain Peeler's argument for ineffective assistance of counsel.

c. Failure to improperly impeach witness

Peeler's sentence will not be disturbed based on his counsel's cross-examination of a government witness. Though "defense counsel ordinarily ha(ve) a duty to investigate possible methods of impeaching prosecution witnesses," Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986), this does not ordinarily render his counsel ineffective. Id. Peeler argues that his attorney should have discredited the testimony of S. Leonard Gough, an Associate

Athletic Director at Clemson University. According to Peeler, Gough's testimony regarding insurance applications for vehicles at Clemson was rife with material misrepresentations. If Gough's testimony were impeached, Peeler argues that he would be a free man. A thorough review of the record reveals that Peeler's counsel gave a thorough cross-examination of Gough. Gough had no history of giving unreliable testimony, and Peeler's attorney had no reason to quetion the answers Gough gave in court. Even if Peeler's counsel could have done more to impeach Gough's testimony, Peeler still received effective counsel. See id. (Failure to impeach witness does not render counsel ineffective where witness has no history or record of perjury or unreliable testimony).

D. Failure to raise pertinent issues on appeal

Peeler next argues that his counsel was ineffective because he failed to raise a pertinent issue on appeal. A jury convicted Peeler on March 11, 1994. Following a notice of appeal, Peeler's attorneys filed an Anders brief on April 19, 1995, stating that there were no meritorious issues for appeal. While this drama played itself out, the Unted States Supreme Court heard oral arguments on April 17, 1995, in the case of United States vs. Gaudin U.S. _____, 115 S. Ct. 2310(1995). Gaudin involved a case of false representations under 18 U.S.C. § 1001 where the Court held that "materiality" was an issue for the jury to decide, not the court. Id. At ____, 115 S. Ct. At 2313. Peeler argues that his counsel was ineffective for failing to raise this Gaudin materiality argument in his appeal. Subsequent opinions by the United States Supreme Court and the Fourth Circuit show the folly in Peeler's argument.

Gaudin is not relevant to Peeler's case. As stated above, Gaudin involved a charge under 18 U.S.C. § 1001. Peeler was convicted under a similar false statement statute, 18 U.S.C. § 1014. Since Gaudin the Supreme Court has held that its opinion in that case does not apply to defendants charged under 18 U.S.C. § 1014. See United States v. Wells, ____ U.S. ____, 117 S. Ct. 921 (1997). As the Fourth Circuit stated in dealing with this precise issue:

> (In Wells), . . . the Supreme Court, addressing 18 U.S.C. § 1001, held that because materiality is not explicitly stated as an element of a crime, it will not be read into the text, and it need not be decided by the jury.

United States v. Sardesi, No. 96-4228, 1997 WL 626540 at **2 (4th Cir. Oct. 10, 1997). Therefore, Peeler received a fair trial under a proper reading of the law. Accordingly, Peeler's argument is without merit.

2. Right to fair trial

Peeler received a fair trial before this court. He argues the court's bias prevented him from receiving a fair trial. As thoroughly outlined above, the court did not harbor any bias or prejudice toward Peeler. See infra Parts III.A.-B. This court upheld Peeler's right to a fair trial before an impartial arbiter.

3. Conviction obtained through false testimony

The government did not use false or tainted testimony at the Peeler trial. "Knowing use of perjured testimony by prosecuting authorities, if sufficiently alleged, taints a conviction obtained therefrom and is a good ground for post conviction relief." Hammond v. United States, 309 F.2d 935, 936 (4th Cir. 1962). To support his allegations, Peeler recounds the testimony of six government witnesses. Peeler attempts to cast doubt on the testimony of these witnesses by making various allegations about their personal and professional lives. The allegations all pertain to some benefit the witness received by testifying against Peeler. Though Peeler does attempt to substantiate some of his allegations, most are made without any support. See (Pet's Mem. Of Law in Supp. Of 2255 Mot. At 16-19.) Even if Peeler could confirm his claims, he has not shown that the government knew of any false or tainted testimony. Therefore, Peeler fails to meet his burden under the law.

Accordingly, it is

ORDERED that Peeler's motion for an alternate judge to preside over this matter is denied. It is further

ORDERED that Peeler's appication for a writ of habeas corpus is denied.

IT IS SO ORDERED.

/S/ HENRY M. HERLONG, JR.
Henry M. Herlong, Jr.
United States District Judge

Greenville, South Carolina
February 24, 1998

NOTICE OF RIGHT TO APPEAL

The movant is hereby notified that he has the right to appeal this order within thirty days from the date hereof, pursuant to Rule 3 and 4 of the Federal Rules of Appellate Procedure.

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit
No. 98-6347
CR-93-165
- CA-98-218-8

Filed July 27, 1998

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

ROBERT L. PEELER, SR.
Defendant – Appellee

Appeal from the United States District Court
For the District of South Carolina at Anderson

In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

/s/Patricia S. Connor
Clerk